No. 92-1339

Supreme Court, U.S.
FILED
SEP 28 1992
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF UNITED STATES

EX PARTE: WILLIAM P. REINBOLD #872390
STATE PRISONER, INDIANA DEPARTMENT OF CORRECTIONS, PRO-SE LITIGANT.
PETITIONER-APPELLANT

V.

PAUL KRANNING—SUPERTINDENT AT BRANCHVILLE TRAINING CENTER.
GENE E. BROOKS—JUDGE, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF INDIANA, EVANSVILLE DIVISION.
HOWARD E. PETERSEN—JUDGE, LAGRANGE COUNTY CIRCUIT COURT, TRIAL/SENTENCING COURT.
RESPONDENT-APPELLEES

PETITION FOR AN EXTRAORDINARY WRIT OF HABEAS CORPUS
[28 U.S.C. § 2241 and 28 U.S.C. § 1651]

PETITIONER, PRO-SE:

WILLIAM P. REINBOLD
BRANCHVILLE TRAINING CTR.
P.O. BOX 500
TELL CITY, INDIANA 47586

RESPONDENT(S):

PAUL KRANNING, SUPT.
BRANCHVILLE TRAINING CTR.
P.O. BOX 500
TELL CITY, INDIANA 47586

LINLEY E. PEARSON
ATTORNEY GENERAL, INDIANA
219 STATE HOUSE
200 W. WASHINGTON St.
INDIANAPOLIS, INDIANA
46204

[SEE REVERSE SIDE OF COVER FOR FURTHER RESPONDENTS]

79 pp

RESPONDENT(S) CONT'D:

GENE E. BROOKS, JUDGE
UNITED STATES DISTRICT COURT
310 FEDERAL BUILDING
101 N.W. 7th STREET
EVANSVILLE, INDIANA 47708

HOWARD E. PETERSEN, JUDGE
LAGRANGE COUNTY CIRCUIT COURT
COURTHOUSE
105 NORTH DETROIT STREET
LAGRANGE, INDIANA 46761

QUESTIONS PRESENTED

1). Did the Court's of Indiana commit error by failing to address the error of "burden-shifting" the instructions to include the offense of Voluntary Manslaughter, when the accused was specifically brought to trial on the charge of Murder in language closely tracking that of the Indiana Murder Statute I.C. 35-42-1-1. Therefore, violating Mr. Reinbold's Constitutional Amendments 5, 6, and 14?

2). Did the District Court deny the Petitioner his right to redress the conviction by failing to issue Probable Cause for Appeal and violating his Due Process under the Fourteenth Amendment of the United States Constitution?

3). Did the District Court fail to address the issue of ineffective

assistance of counsel during State proceedings when the District Court of Indiana was the first opportunity for the accused to present said issue to any Court?

PARTIES TO THE PROCEEDINGS

The only parties to these proceedings are those contained in the caption on this Petition for Extraordinary Writ of Habeas Corpus, to wit: Paul Kranning, Superintendent at Branchville Training Center where the Petitioner is retained under the authority of the State of Indiana; Gene E. Brooks, Chief Judge of the United States District Court, for the State of Indiana, Evansville Division, Cause EV-91-121-C, for Writ of Habeas Corpus; Howard E. Petersen, Trial and Sentencing Judge, LaGrange County, State of Indian; and Linley E. Pearson, Attorney General for the State of Indiana. No other parties are named Respondents herein.

TABLE OF CONTENTS

PETITION FOR EXTRAORDINARY WRIT OF HABEAS CORPUS TO THE SUPREME COURT OF UNITED STATES

	PAGE
OPINIONS BELOW	2
JURISDICTION	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	21

INDEX TO APPENDICES

APPENDIX A: Opinion of Supreme Court of Indiana reported in **REINBOLD V. STATE**, 555 **N.E.2d 463.**

APPENDIX B: Opinion of the United States District Court for Southern District of Indiana, Evansville Division, reported in **REINBOLD V. KRANNING**, Cause EV-91-121-C.

APPENDIX C: Opinion of the United States Court of Appeals for the Seventh Circuit

INDEX TO APPENDICES CONT'D

denying Notice of Appeal on Writ of Habeas Corpus.

APPENDIX D: Opinions on Petitions for Reconsideration to the District Court, Evansville and the Court of Appeals, Seventh Circuit.

TABLE OF AUTHORITIES CITED

PAGE

CARRIER V. HUTTO, 724 F.2d 396..... 20

IN RE WINSHIP, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368.. 11

MORISSETTE V. UNITED STATES, 342 U.S. 246, 72 S.Ct. 240..... 12

PULLEY V. HARRIS, 465 U.S. 37, 41.... 14

REINBOLD V. STATE, 555 N.E.2d 463.... 18

SANDSTROM V. MONTANA, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39..... 10

UNITED STATES V. ANDERSON, 859 F.2d 1171..... 16

UNITED STATES V. FRADY, 456 U.S. at 163, 102 S.Ct. at 1592..... 16

UNITED STATES V. UNITED STATES GYPSUM Co., 438 U.S. 422, 98 S.Ct. 2864..... 12

UNITED STATES V. SANDINI, 888 F.2d 300, 309..... 16

UNITED STATES V. THAME, 846 F.2d 200, 204-05..... 16

UNITED STATES V. YOUNG, 470 U.S. 1, 15, 105 S.Ct. 1038, 1046..... 16

WAINWRIGHT V. SYKES, 433 U.S. 72, 97 S.Ct. 2497..... 18

PAGE

STATUTES:

TITLE 28, SECTION 1651.....

TITLE 28, SECTION 2241..... 3

INDIANA CODE 35-42-1-1..... 5

UNITED STATES CONSTITUTION:

FIFTH AMENDMENT..... 16

SIXTH AMENDMENT..... 20

FOURTEENTH AMENDMENT..... 16

No._____

IN THE
SUPREME COURT OF UNITED STATES

EX PARTE: **WILLIAM P. REINBOLD #872390**
PETITIONER-APPELLANT

V.

LINLEY E. PEARSON—— ATTORNEY GENERAL FOR THE STATE OF INDIANA.
RESPONDENT-APPELLEE

PETITION FOR AN EXTRAORDINARY WRIT OF HABEAS CORPUS

Petitioner-Appellant, William P. Reinbold, respectfully prays that an Extraordinary Writ of Habeas Corpus issue to review judgments of the LaGrange County Circuit Court, United States District Court of Indiana, and the Court of Appeals for the Seventh Circuit, refusing to issue probable cause for appeal on the conviction on the charge of Voluntary Manslaughter and a

carge that was not included in the alleged charging information and the evidence did not support said offense. Therein violating the accused's Fifth, Sixth, and Fourteenth Amendments to the United States Constitution to Due Process.

OPINIONS BELOW

The opinion of the Indiana Supreme Court of Appeals is reported in **REINBOLD V. STATE, 555 N.E.2d 463** and appears in this Petition as Appendix A. The opinions of the United States District Court for Southern Indiana and the United States Court of Appeals for the Seventh Circuit, appear in the Appendice and designated as Appendix B and C, respectively. Thereafter, the District Court's and Court of Appeals response to the Petitioner's Petition for Reconsideration is attached therein and marked as Appendix D.

Petitioner, William P. Reinbold, now Petitions this Court for an Extraordinary Writ of Habeas Corpus pursuant to **28 U.S.C. § 2241**. Without the granting of this Writ, the Supreme Court of United States may never have the opportunity to exercise its potential appellate jurisdiction over this cause for the lower tribunals failure to issue probable cause for appeal to the Seventh Circuit and therefore, foreclosing the Petitioner from obtaining redress of the erroneous conviction as a result therefrom.

JURISDICTION

The Court of Appeals for the Seventh Circuit and the District Court for Southern Indiana issued their denials for reconsideration on July 31, 1992 and August 27, 1992, respectively and attached as Appendix D to this Writ.

This Court has jurisdiction to review judgments of the tribunals herein, pursuant to

28 U.S.C. § 2241(a)(c)(1-3) and **28 U.S.C. § 1651.**

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT V:

"No person shall....be deprived of life, liberty, or property, without due process of law...."

UNITED STATES CONSTITUTION, AMENDMENT VI:

"In all criminal prosecutions, the accused shall enjoy the right....to effective assistance of counsel for his defense."

UNITED STATES CONSTITUTION, AMENDMENT XIV:

"....no State shall....deprive any person of life, liberty, or property, without due process of law; nor deny to any person the equal protection of laws."

STATEMENT OF THE CASE

The sole claim and authority by which Paul Kranning, Superintendent at Branchville Training Center, restrains and retains William P. Reinbold is by commitment by LaGrange County Circuit Court upon the charging information charging Mr. Reinbold with Murder, I.C. 35-42-1-1.

Direct appeal was taken to the Supreme Court of Indiana and subsequently denied on june 1990. Thereafter, your Petitioner filed for a Writ of Habeas Corpus to the United States District Court for Southern District of Indiana on August 16, 1991. Cause EV-91-121-C. Said Writ was denied by Judge Gene E. Brooks on April 24, 1992 by Judgment and Order.

Mr. Reinbold filed Notice of Appeal to the District Court on May 8, 1992 with the filing fee for the same.

On May 20, 1992, the United States District Court filed their "second" denial

denying Mr. Reinbold Leave to Proceed In Forma Pauperis and Certificate of Probable Cause For Appeal.

On June 1, 1992, Mr. Reinbold filed for Petition for Issuance of Probable Cause to the United States Court of Appeals for the Seventh Circuit with filing fee.

On July 1, 1992, the Court of Appeals denied the Petitioner's request for probable cause.

On july 16, 1992, Mr. Reinbold filed for Reconsideration on Issuance of Probable Cause to both the United States District Court for Southern Indiana and the Court of Appeals for the Seventh Circuit.

On July 31, 1992, the Court of Appeals denied the Petitioner's Petition for Reconsideration of Probable Cause.

On August 27, 1992, the United States District Court for Southern Indiana also denied Mr. Reinbold's request for Issuance of Probable Cause.

The gist of Mr. Reinbold's arguement throughout the appeal process in this cause was the fact that the State of Indiana intentionally used a burden-shifting tactic during instructions to cause the illicit conviction. That instruction caused your Petitioner to be charged with an offense that was not included within the charging instrument and precluded Mr. Reinbold from preparing a defense against the charge. Therefore, violated his rights to due process under the Fifth and Fourteenth Amendments of the United States Constitution.

Furthermore, Mr. Reinbold's contentions that he was denied effective assistance of counsel are equally with merit and can not be overlooked when reviewing the case at bar. Counsel's alleged strategy involved therein fell short of adequate representation when the error of this conviction evolves around the Constitutional question of burden-shifting.

It has been uncontraverted that Mr. Reinbold retained the same counsel throughout the State proceedings and thereafter, the first opportunity for the accused to present the issue of ineffective assistance was during the Habeas action in this cause. The record firmly agrees with the Petitioner that the first chance he had to present that issue was in the United States District Court and thereinafter did so. The Supreme Court also agrees that it is permissible to present ineffectiveness for the first time in the District or Appellate Courts within the nation.

Herein, Mr. Reinbold now Petitions this Court for a Extraordinary Writ of Habeas Corpus to correct the alleged error as he has exhausted all available State and Federal remedies before Petitioning this Court on those grounds sought through direct appeal.

Mr. Reinbold has further sought redress by petitioning the State Court through

Post-Conviction Relief, PC1, and presenting other unexhausted grounds involving the Fourth Amendment of the United States Constitution. Thus far, the State tribunal, LaGrange County Circuit Court, has refused to respond to said petition and prejudices Mr. Reinbold's attempt to seek redress of his erroneous conviction.

REASONS FOR GRANTING THE WRIT

1). Did the Court's of Indiana commit error by failing to address the error of "burden-shifting" the instructions to include the offense of Voluntary Manslaughter, when the accused was specifically brought to trial on the charge of Murder in language closely tracking that of the Indiana Murder Statute, I.C. 35-42-1-1. Therefore, violating Mr. Reinbold's Constitutional Amendments 5, 6, and 14.

This case presents an inportant question of law on whether the trial Court

can, at their discretion, change the charges, or give erroneous instructions, of an accused, without formal drafting of the charging information and failing to give notice to the Petitioner of said changes, without violating the accused's Constitutional Rights to Due Process.

That answer had been resolved in the negative in **SANDSTROM V. MONTANA, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39.**

In that case, the Defendant appealed to the Supreme Court and that Court held that, "....because the jury, which was instructed that, a person intends the ordinary consequences of his voluntary acts, may have interpreted the presumption as conclusive or as shifting the burden of persuasion, and because either interpretation would have violated the Fourteenth Amendment that the State prove 'every element of a criminal prosecution beyond a reasonable doubt'[1], the instruction given was unconstitutional."

The effect of a presumption, in a jury instruction, is determined by the way in which a reasonable juror could have interpreted it, not the State Court's interpretation of it's legal import.

Conclusive presumption, "conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime....and that they invade the fact finding function....which in a criminal case, the law assigns to the jury."[2]

In the case at bar, the jury had been easily misled to believe that they could find Mr. Reinbold guilty of either Voluntary Manslaughter or Murder at their discretion. The charging information against Mr. Reinbold, was designated in language tracking the Murder Staute of Indiana and did not contain the additional

1. Sandstrom relied heavily on the interpretation of 'reasonable doubt' as set forth in IN RE WINSHIP, 397 U.S. 358, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368.

language necessary for the State to charge the accused or to place the accused on notice that he was being charged with any other offenses other than Murder.

SANDSTROM, has made it clear that this particular tactic, violates the accused's Due Process Rights to a fair and impartial trial and should be carefully scrutinized by lower tribunals for abuse of discretion. A similar ruling should be made in the case at hand in an attempt to restore Mr. Reinbold to the position he was in before the miscarriage of justice took place.

By this Court's review of the actual charging information and the instructions that were had at trial, the factor of burden-shifting will become a prima facia error by the State with a need to be corrected.

2. See also, MORISSETTE V. UNITED STATES, 342 U.S. 246, 72 S.Ct. 240 and UNITED STATES V. UNITED STATES GYPSUM Co., 438 U.S. 422, 98 S.Ct. 2864.

The factor required to prove the State's claim of Voluntary Manslaughter is "sudden heat." Pursuant to Indiana Code 35-42-1-2, the burden of proof was on the State of Indiana to prove that 'sudden heat' existed in the offense but, the State failed to prove this element and denied Mr. Reinbold a fair and impartial trial guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution.

Nowhere on the record had the State shown that the accused acted with malice forethought when Mr. Reinbold was faced with a violent outrage of emotions from Ronald Lothamer threatening to "kill them both." Therefore, the inclusion of the second instruction on Voluntary Manslaughter after trial had commenced should be construed as a deliberate attempt to cause the conviction of an innocent man by the State of Indiana and prejudice any defense he could have had against said charge.

2). Did the District Court deny the Petitioner his right to redress the conviction by failing to issue probable cause for appeal and violating his due process under the Fourteenth Amendment of the United States Constitution?

Pursuant to 28 U.S.C. § 2253, a Petitioner seeking a Writ of Habeas Corpus on appeal will be foreclosed from doing such until the District Court submits a Certificate of Probable Cause.

In the present case, the District Court for Southern Indiana determined that Mr. Reinbold is not entitled to said Certificate of Probable Cause. The District Court relied on the case of **PULLEY V. HARRIS, 465 U.S. 37, 41(1984)**[3] in determining that your Petitioner did not have the right to redress his conviction by failing to issue probable cause for appeal.

3. **In PULLEY it was stated that, "a Writ of Habeas Corpus will not issue upon perceived errors of state law unless those errors can be shown to be 'totally arbitrary' or 'discriminatory.'"**

It is completely incongruous that the District Court can say that the burden-shifting of the instructions by the trial court is a remedy that is acceptable throughout the nation and the rest of the Circuits without being "totally arbitrary and discriminatory" against the accused.

Therefore, the viable remedy for the District Court would have been to issue a Certificate of Probable Cause and allow Mr. Reinbold to appeal this tactical advantage caused by the State to convict an innocent man and release the burden of facing the Federal/State comity to the Seventh Circuit for review.

Mr. Reinbold rests his authority in his contentions that Certificate of Probable Cause should issue in this case, with **UNITED STATES V. FRADY**[4], and prays indeed that the Supreme Court will see that the burden-shifting tactic by the State of Indiana did unlawfully violate the Petitioner's

Rights to Due Process and Equal protection under the Fifth and Fourteenth Amendments of the United States Constitution and correct the manifest abuse of discretion caused by a sole state prosecutor to cause this erroneous conviction of the Petitioner. Thereby, having issue a Writ against the State of Indiana and resolve the Constitutional question of wheter it is appropriate for the State's tribunal to burden-shift the instructions and convict individuals with complete disregard of their Constitutional Rights.

4. UNITED STATES V. FRADY, 456 U.S. at 163, 102 S.Ct. at 1592, recourse may be had only on appeal and review from a trial "infected with error so plain the trial judge and prosecutor were derelict in countenancing it, even if it were absent the defendant's timely assistance in detecting it." See also; UNITED STATES V. YOUNG, 470 U.S. 1, 15, 105 S.Ct. 1038, 1046, 84 L.Ed.2d 1(1985); UNITED STATE V. SANDINI, 888 F.2d 300, 309(3rd Cir.1989); UNITED STATES V. ANDERSON, 859 F.2d 1171, 1175; UNITED STATES V. THAME, 846 F.2d 200, 204-05.

3). Did the District Court fail to address the issue of ineffective assistance of counsel during State proceedings when the District Court of Indiana was the first opportunity for the accused to present said issue to any Court?

The record squarely confirms the fact that Mr. Reinbold had retained the same counsel throughout the State proceedings in this cause. Mr. Bechert, counsel for the defense, had taken the appeal to the State's highest Court, Indiana Supreme Court of Appeals, after trial. What the record does establish is, the final adjudication in the Supreme Court came approximately Thirty-two(32) months after the appeal process was initiated in LaGrange County.

However, Mr. Bechert did attempt to persuade the Court that Mr. Reinbold's Due Process Rights had been violated by the State by the aformentioned "burden-

shifting" tactic utilized by LaGrange County's prosecutor, Susan Glick. The Supreme Court of Indiana erroneously held that, this type of instruction was legal in the State of Indiana, and is reported at **REINBOLD V. STATE, 555 N.E.2d 463.**

Prior to the appeal process, commenced by Mr. Bechert, Mr. Reinbold presented suggestions to counsel to apprise the State's highest Court of the extreme Constitutional issues prevalent when a Court chooses to include instructions of an offense that was not included in the charging information. The outcome was that Mr. Bechert chose to ignore the accused's suggestions and restrained his arguments on the less serious issues of restitution and change of venue.

It had been well established in **WAINWRIGHT V. SYKES, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594(1977)**, that without a showing of a Constitutional violation

and resulting prejudice therefrom, review of those constitutional claims would be barred on Habeas as on direct appeal.

However, the record establishes that Mr. Reinbold did present the State's highest Court with the alleged burden-shifting tactic caused by the overzealous operation of a single state prosecutor, Susan Glick, and the resulting prejudice resulted in Mr. Reinbold being convicted of an offense that he is not guilty of. Mr. Bechert's failure to argue strenuously the issue of burden-shifting and the other Constitutional claims that were obvious during trial, can only be construed as counsel's attempt to dilute those claims and substitute lesser issues to difuse the Supreme Court's attention from the seriousness of the atrocity committed against Mr. Reinbold and secure a conviction for the State of Indiana.

Mr. Bechert's failure to present

the magnitude of those Constitutional violations was a direct due process error and therefore, denied Mr. Reinbold effective assistance of counsel as required by the Sixth Amendment of the United States Constitution.

In similarities to the case at bar, Mr. Reinbold wishes to present this Court with authority from **CARRIER V. HUTTO**, **724 F.2d 396** and the **WAINWRIGHT** cause to imply that counsel for the Petitioner may have deliberatly sandbagged those Constitutional issues or the possibility of counsel's lack of knowledge in the area of the Constitutional issues involved in a Murder charge may cause sufficient grounds to apply the **WAINWRIGHT** cause to the case at bar and correct a manifest abuse of discretion caused to Mr. Reinbold.

Mr. Bechert allowing the LaGrange County Circuit Court to fraudulently mislead the jury into believing that they can find Mr. Reinbold guilty of either

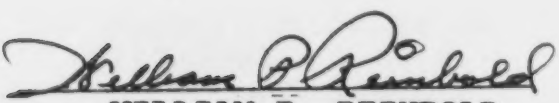
Murder or Voluntary Manslaughter is in the truest sense of fair play, a sheer mockery of the judicial system. The comprimised instruction left Mr. Reinbold 'no way out' of a charge in which the victim was the initial aggressor and had committed 'forcible entry' to gain access to the Reinbolds' before threatening them.

CONCLUSION

For reasons set forth within the body of this petition for an Extraordinary Writ of Habeas Corpus, Mr. Reinbold prays that a Writ should issue to review the decisions of the Indiana Supreme Court and the final decisions of the United States District Court for the Southern Indiana and the Court of Appeals for the Seventh Circuit; or in the alternative, remand this cause to the United States

Court of Appeals for the Seventh Circuit to review those alleged errors committed at trial; or, any and all other relief that this Court may deem necessary to insure justice is properly served.

Respectfully submitted,



WILLIAM P. REINBOLD

Branchville Training Center
p.o. box 500
Tell City, Indiana 47586

DATED: JANUARY 26, 1993

No._____

IN THE
SUPREME COURT OF UNITED STATES

APPENDICE FOR
A PETITION FOR AN EXTRAORDINARY
WRIT OF HABEAS CORPUS

DATED: JANUARY 26, 1993

PETITIONER-APPELLANT

William P. Reinbold
Branchville Training Center
P.O. Box 500
Tell City, Indiana
47586

REINBOLD V. STATE, 555 N.E.2d 463(Ind. 1990)

William P. REINBOLD, Appellant,

v.

STATE of Indiana, Appellee

No. 44S00-8710-1018.

Supreme Court of Indiana

June 8, 1990

Defendant was convicted of voluntary manslaughter by the LaGrange Circuit Court, Howard E. Petersen, J., by jury verdict. Defendant appealed. The Supreme Court, DeBruler, J., held that: (1) instruction on voluntary manslaughter was not error; (2) defendant was not entitled to tendered instruction on self-defense; (3) defendant was not entitled to change of venue; and (4) defendant could be required to pay restitution to victim's survivors.

Affirmed.

1. Criminal Law 835

Test applied to review trial court's decision to give or refuse tendered instruction is whether instruction correctly states the law, whether there was evidence

APPENDIX A

in record to support giving of the instruction, and whether substance of tendered instruction was covered by other instructions which were given.

2. Criminal Law 795(1)

When determining propriety of instruction on lesser included offense, trial court must first examine statutes involved and charging information and then examine evidence to see if instruction on lesser included offense is warranted.

3. Homicide 308(1)

Murder charge cannot be drafted so as to preclude the possibility of conviction on voluntary manslaughter upon the introduction of evidence that the defendant acted in sudden heat and upon the acceptance of that evidence by the jury.

4. Homicide 309(6)

Trial court properly instructed jury on voluntary manslaughter, in murder prosecution; language of charging instrument supported giving of instruction on both

murder and voluntary manslaughter since both involved the knowing or intentional killing, and there was sufficient evidence that the defendant was acting under sudden heat at time of shooting.

5. Criminal Law 822(1)

Jury instructions are not to be considered in isolation, but rather, as a whole and with reference to each other.

6. Criminal Law 829(5)

Defendant was not entitled to tendered instruction on self-defense, in murder prosecution; trial court's instruction on self-defense covered substance of tendered instruction.

7. Criminal Law 834(3)

Defendant was not entitled to tendered instruction regarding protection of property, in murder prosecution; although trial court's instruction on protection of property was not framed in language preferred by defendant, trial court's instruction addressed substance of defendant's tendered instruction.

8. Homicide 112(1)

Identity of initial aggressor and communication of intention to withdraw from combat came into play where defendant, not victim, was the initial aggressor, for purposes of self-defense instruction in murder prosecution; purpose of self-defense statute is to provide complete legal defense for acts taken by the initial victim, who becomes ultimate defendant, against initial aggressor who becomes the ultimate victim. IC 35-41-3-2(d)(3) (1988 Ed.).

9. Criminal Law 829(16)

Defendant was not entitled to tendered instruction regarding expert psychiatric testimony, in murder prosecution; trial court gave general instruction which encompassed the more specific instruction sought by defendant.

10. Criminal Law 1166(4)

To prevail on appeal from denial of motion for change of venue premised on pretrial publicity in criminal case,

defendant must show, in addition to existence of prejudicial pretrial publicity, that jurors were unable to set aside their preconceived notions of guilt and render verdict based upon evidence.

11. Criminal Law 126(2)

Pretrial publicity did not entitle defendant to change of venue, in murder prosecution; every juror indicating inability to put aside prior knowledge of the case, gained either through the media or from discussions with other persons, was excused for cause, and defendant did not use all of its peremptory challanges during the jury selection process.

12. Criminal Law 986.2(1)

Factors listed in statute giving aggravating circumstances that may be considered in imposing sentence are not exclusive; sentencing court is free to consider other relevant factors relating to specific facts of the crime and defendant's character. IC 35-38-1-7(b) (1988 Ed.).

13. Criminal Law 982.5(2), 1208.4(2)

Trial court has the authority to order that one convicted of a felony or misdemeanor make restitution "to the victim" as part of sentence or as condition of probation IC 35-38-2-2(a)(5), 35-50-5-3(a) (1988 Ed.).

14. Criminal Law 1208.4(2)

Defendant, who was convicted of voluntary manslaughter, could be required to pay restitution to the victim's survivors for monetary losses sustained as a result of defendant's criminal acts; word "victim" did not have to be construed so narrowly as to limit payment of restitution only to person or enity actually subjected to the commission of a crime. IC 35-38-2-2(a)(5), 35-50-5-3(a) (1988 Ed.).

15. Criminal Law 1147, 1208.2

Power to fashion sentence within statutorily prescribed parameters is discretionary power vested in trial court, and sentence will be set aside or modified on appeal only when it is manifestly unreasonable

if no reasonable person would find it appropriate given the particular offense and offender.

16. Criminal Law 982.3, 1147

Sentencing power includes statutory discretion to suspend and order probation and set out its terms, and probation order will be set aside only upon showing that trial court abused its discretion.

17. Criminal Law 982.5(2)

Homicide 354(1)

Sentence which made amount of fine ultimately payable and continued suspension of sentence conditioned on payment of restitution and partial satisfaction of fine within prescribed time frame was not abuse of discretion for defendant convicted of voluntary manslaughter; although sentencing and probation order was admittedly unusual, none of its provisions could be described as unreasonable or in excess of authority given to sentencing court, and trial court's aim appeared to have been to provide

defendant with incentive to make speedy restitution. IC 35-38-2-2(a)(5), 35-42-1-3, 35-50-5-3(a) (1988 Ed.).

Robert S. Bechert, Randall J. Hammond, Tremper, Bechert, Leonard & Terrill, Fort Wayne, for appellant

Linley E. Pearson, Atty. Gen., Amy Schaffer Good, Deputy Atty. Gen., Indianapolis, for appellee.

DeBRULER, Justice.

Following a jury trial, appellant was convicted of voluntary manslaughter, a class B felony, I.C. 35-42-1-3, and was given a twenty-year sentence. Appellant now brings this direct appeal and claims that the trial court erred in giving and refusing certain instructions, in denying his motion for change of venue from county, and in sentencing.

The facts giving rise to this appeal are essentially without dispute. In 1986, Ronald Lothamer was a thirty-five-year-old divorced man living with his parents, who has

a summer cottage on a lake. Appellant, a retired policeman with twenty years experience on the Fort Wayne police department, and his wife, Ruth Reinbold, lived next door. The two families had a history of friction regarding property lines and easements which had included numerous loud, profanity ridden arguments, most often between Ruth Reinbold and Ronnie Lothamer. Ruth Reinbold had also committed several acts of vandalism on the Lothamer property, of which appellant was not aware, and had written Ronnie Lotamer an antagonistic note. At his wife's urging, appellant had lodged several complaints with local officials concerning encroachments by the Lotamers on private and county easements and septic system violations and accusing Ronnie Lothamer of stealing firewood from them. As a result of one of the complaints, the Lothamers had to move a shed which they had constructed because it extended a few feet over their property line.

Ronnie Lotamer decided to remain

at the lake through the winter, and on September 7, 1986, he and two others erected an oil tank to provide heat for the cottage. Appellant and Lothamer exchanged words as to whether it was being put up over the property line while Ruth shouted obscenities from her porch. After the Reinbolds went back into their house, Lothamer consulted with another neighbor over a survey map, and they agreed that the tank was within the Lothamers' boundry. When the construction was completed and Lothamer was gone, Ruth knocked the tank over. Appellant unsucessfully sought the help of a neighbor to put it back up. He decided not to do it himself because, knowing Lothamer had a reputation for a violent temper, he did not want to be caught alone on Lothamer' property. When Lotamer returned later that evening and saw that his tank was down, he rushed next door. The Reinbolds were eating supper in their living room as Lotamer burst through the screen door, shouting, "God damn you Reinbolds, I'm going to kill you both." Appellant ran

into their bedroom to obtain his .9 mm handgun. While appellant was in the bedroom, Ruth picked up a heavy ceramic figurine from a coffee table and ran at Lothamer, shouting for him to get out. Lotamer turned and ran back out the front door, and Ruth hurled the figurine at him. Appellant saw nothing of this, but heard the crash of glass and his wife shouting, "Shoot him, Shoot him," as he came back into the living room, and he fired two shots in rapid succession. The location of the empty casings indicated that the appellant fired from near the front door. Lothamer died on the sidewalk at the front of the house of two gunshot wounds. Both entry wounds were to his back; one bullet exited through his chest and the other through his side. He was unarmed.

I. Instructions

[1] Appellant claims that the trial court erred by instructing the jury on voluntary manslaughter as a lesser included offense of murder and by refusing his proffered

instructions on the issue of self-defense and on the evaluation of expert testimony. The test applied to review a trial court's decision to give or refuse a tendered instruction is 1) whether the instruction correctly states the law; 2) whether there was evidence in the record to support the giving of the instruction; and 3) whether the substance of the tendered instruction is covered by other instructions which are given. **Coats v. State (1989), Ind., 534 N.E.2d 1087.**

1. Lesser Included Offense

Appellant was charged with murder for the knowing killing of Ronnie Lothamer pursuant to I.C. 35-42-1-1(1). The information, omitting the formal parts, reads as follows:

> [O]n or about the 7th day of September, 1986, at and in the County of LaGrange and State of Indiana, William Paul Reinbold did then and there knowingly kill a human being, namely: Ronald L. Lothamer by shooting at and

against the body of said Ronald L. Lothamer, with a certain 9 millimeter handgun loaded with gunpowder and metal bullets, then and there held in the hand of the said William Paul Reinbold, and did then and there inflict mortal wounds in and upon the body of Ronald L. Lothamer causing him to die....

Appellant argues that it was error for the trial court to instruct the jury on voluntary manslaughter because the information was drafted so narrowly as to preclude conviction on any offense other than murder.

[2] In **Wedmore v. State (1988), Ind. 519 n.e.2d 546**, this Court set out the test for determining the propriety of an instruction on a lesser included offense. The trial court must first examine the statutes involved and the charging information and then examine the evidence to see if an instruction on a lesser included offense is warranted. **Id. at 547 (citing Sills v. State (1984), Ind., 463 n.e.2d 228; Jones**

v. State (1982), Ind., 438 N.E.2d 972; Lawrence v. State (1978), 268 Ind. 330, 375 N.E.2d 208). Appellant cites the decisions from this Court in **Sills, Jones,** and **Compton v. State (1984), Ind., 465 N.E.2d 711,** for the proposition that the prosecution may foreclose to a defendant the tactical opportunity to seek conviction on a lesser offense through the drafting of the charging instrument, most typically by closely tracking the statutory defination of the offense and by inserting no additional language which might indicate an intention to charge a lesser offense. See **Slayton v. State (1984), Ind.App., 471 N.E.2d 1154.** Appellant argues that because the instrument under which he was charged closely tracked the murder statute and there was no additional "sudden heat" language which would have alerted him that the voluntary manslaughter statute might be applicable, the State was foreclosed from seeking a conviction for voluntary manslaughter.

[3] The State bears the same burden of proof in order to obtain a conviction for either murder or voluntary manslaughter. In both cases, the State must prove to a moral certainty beyond a reasonable doubt that the accused knowingly or intentionally killed a human being. The distinction between the two crimes is the presence or absence of the statutory mitigator provided by I.C. 35-42-1-3, which states that one who knowingly or intentionally kills while acting under sudden heat commits voluntary manslaughter, which is a class B felony rather than the murder felony. **Palmer v. State (1981), Ind., 425 N.E.2d 640.** The voluntary manslaughter statute provides the State the option to charge the lesser offense against one who has knowingly or intentionally killed, but whose culpability appears not to warrant prosecution for murder, and it provides the accused the opportunity to escape conviction for what would otherwise be murder upon a showing

that he acted in sudden heat. A murder charge cannot be drafted so as to preclude the possibility of a conviction on voluntary manslaughter upon the introduction of evidence that the defendant acted in sudden heat and upon the acceptance of that evidence by the jury.

[4] Application of the test set forth in **Wedmore** shows that the trial court properly instructed the jury on voluntary manslaughter. First, the language of the charging instrument supports the giving of an instruction on both murder and voluntary manslaughter since both involve a knowing or intentional killing. Second, the evidence adduced at trial supports the instruction on the lesser included offense. Both appellant and his wife testified that as they sat having supper in their living room, Lotamer burst in, cursing them and shouting that he was going to kill them both. Appellant testified that at that moment, the word "massacre" came to his mind and that he screamed and jumped up,

sending the dishes on his lap crashing to the floor, and ran for his gun. He testified further that as he came running back into the living room, he heard a crash of glass and his wife screaming, "Shoot him, shoot him," and that he then fired two shots. There was sufficient evidence that appellant was acting under sudden heat at the time of the shooting.

The fact that the State charged appellant with murder and sought final instruction on voluntary manslaughter only after the presentation of all the evidence is not determinative. In a murder trial, once evidence of sudden heat is introduced by either party, an instruction on voluntary manslaughter is appropriate. **Underwood v. State (1989), Ind., 535 N.E.2d 118; Palmer, 425 N.E.2d 640**

2. Self-Defense

[5,6] Appellant's tendered instruction No. 18 was averbatim quote of three paragraphs from this Court's decision in

Banks v. State §1971¶, 257 Ind. 530, 276 N.E.2d 155, the substance of which is that the acts of one claiming self-defense are to be evaluated from the standpoint and perception, even if mistaken, of that individual at the time and under the circumstances of the incident as shown by the evidence. Appellant argues that the trial court erred by refusing this instruction and by giving its instruction No. 22, which set out the statutory provisions on self-defense. Jury instructions, however, are not to be considered in isolation, but rather as a whole and with reference to each other. **Whisman v. Fawcett (1984), Ind., 470 N.E.2d 73.** The trial court's final instruction No. 22, in pertinent part, read:

> The question of the existence of... danger at the time of the killing, the necessity or apparent necessity for the use of force employed by the defendant, as well as the amount of force necessary to resist an attack, can only be determined from

the perspective of the defendant at the time and under all existing circumstances.

The substance of the refused instruction was covered by the trial court's final instruction No. 22 and therefore it was not error to refuse appellant's tendered instruction No. 18. **Coates, 534 N.E.2d 1087.**

Trial court also refused to give, as submitted, appellant's tendered instructions Nos. 21 and 24. The trial court however, indicated that both instructions were given as modified. Appellant maintains that his instructions were not given in modified form and that their omission constitutes reversible error.

[7,8] Appellant's instruction No. 21 stated: "One who is confronted on his own property with a crime is entitled to great latitude and protection of his rights and property." The court instructed the jury that when one is confronted on his own property with another's unlawful entry

thereon, he may use the amount of force he believes is "reasonably necessary" to prevent or terminate the trespasser's unlawful entry or attack. While the court's instruction was not framed in the language preferred by the appellant, it addressed the substance of appellant's tendered instruction on the issue of protection of property and therefore the refusal was not error. **Id.**

Appellant's tendered instruction No. 24 read:

> If based upon the evidence presented in this case, you determine that Ronald Lothamer was the initial aggressor in the confrontation between him and the defendant, you are instructed that the defendant William Reinbold is legally entitled to act in self-defense of such aggression so long as the apparent danger as perceived by the defendant exists. With regard to the perceived or apparent danger to the defendant, you may consider whether or not

Ronald Lotamer communicated or attempted to communicate to the defendant a withdrawal or abandonment of his initial aggression.

This proferred instruction is not a correct statement of the law, and the trial court did not err in refusing it. **Id.** The identity of the initial aggressor and the communication of the intention to withdraw from combat come into play where the defendant, not the victim, was the initial aggressor. See I.C. 35-41-3-2(d)(3). The purpose of the self-defense statute itself is to provide a complete legal defense for the acts taken by the initial victim, who becomes the ultimate defendant, against the initial aggressor, who becomes the ultimate victim. Appellant received full and proper instruction on the issue.

3. Expert testimony

[9] The trial court refused appellant's tendered instruction No.28, which stated that the jury could consider expert

psychiatric testimony concerning appellant's ability to perceive, remember and relate the events at issue here in evaluating appellant's credibility. The trial court gave instead its final instruction No. 24, which fully instructed the jury how to evaluate expert testimony. The instruction stated in part that the expert testimony is exempt from the general prohibition against opinion testimony because of the witness's education, knowledge and experience which charged the jury to consider and evaluate such testimony in light of the purpose for which it was elicited. This general instruction encompassed the more specific instruction sought by the appellant, and while appellant's tendered instruction could have been properly given, the trial court did not err in refusing it. **French v. State (1987), Ind., 516 N.E.2d 40**

II. Change of Venue

Appellant moved for a change of venue from county, asserting that extensive

pre-trial publicity precluded his opportunity to receive a fair and impartial trial. In support of this motion, appellant filed a video tape of television news coverage of the incident, newspaper clippings, and the result of an independent survey conducted by an investigative agency hired by his attorney. The trial court denied the motion, and the appellant claims that this ruling was erroneous in light of the extensive evidence of bias and prejudice that he produced.

[10, 11] To prevail on appeal, appellant must show, in addition to the existence of prejudicial pre-trial publicity, that the jurors were unable to set aside their preconceived notions of guilt and render a verdict based upon the evidence. **Burdine v. State (1987), Ind., 515 N.E.2d 1085.** A review of the record of the voir dire proceedings shows that every juror indicating an inability to put aside prior knowledge of the case, gained either through the media or from discussions with other persons, was

excused for cause. Further, appellant did not use all of his peremptory challanges during the jury selection process. **Kappos v. State (1984), Ind., 465 N.E.2d 1092.** The trial court's denial of appellant's motion for change of venue was not error.

III. Sentencing

Appellant was convicted of voluntary manslaughter, which is a class B felony carrying a ten-year presumptive sentence. I.C. 35-50-2-5. The trial court made specific findings on the presence of both aggravating and mitigating circumstances and, upon its finding that the aggravating outweighed the mitigators, enhanced the presumptive sentence by ten years and imposed a twenty-year sentence. The court also assessed a $10,000 fine and court costs against appellant and ordered that he pay restitution of $12,578.43 to Lothamer's survivors. The court then suspended seven years of that sentence and ordered that $5,000 of the fine be suspended so long as the terms and conditions of probation were complied with. The court

set a five-year term of probation, to begin following appellant's release from the Department of Corrections, and imposed the following conditions on probation:

1. Defendant must pay all restitution sums ordered before release from probation.
2. Defendant shall not reside in a house where a firearm is present nor shall he have a firearm in his possession or control.
3. If the restitution, court costs and $1,000.00 of the fine are paid within 90 days of this date[,] an additional $4,000.00 of fine is suspended until probation is closed.
4. In the event the probation conditions are not executed within thirty(30) days [of the close of the probation period], said sentence suspension shall be null and void.

Appellant claims on appeal that the trial court erred in enhancing the presumptive sentence, in ordering restitution paid to non-victims, and in imposing conditional terms of suspension and probation.

1. Consideration of Aggravating Circumstances

[12] Appellant argues that the sentence enhancement cannot stand because the trial court considered aggravating factors which are not enumerated in I.C. 35-38-1-7(b). Although the trial court's statement of its findings does not track the statutory language, several of the aggravators found to exist in this cause fall within the general categories identified by 35-38-1-7(b) as being aggravating factors appropriate for consideration in determining sentence. Further, subsection (d) of the sentencing statute expressly states that the considerations listed elsewhere in the statute "do not limit the matters that the court may consider in determining the sentence." This court has

repeatedly held that the factors listed in subsection (b) are not exclusive and that a sentencing court is free to consider other relevant factors relating to the specific facts of the crime and defendant's character. See **Aguirre v. State (1990), Ind., 552 N.E.2d 473; Ballard v. State (1988), Ind., 531 N.E.2d 196; Miles v. State (1984), Ind., 468 N.E.2d 1040.** There was no error.

2. Restitution

[13, 14] A trial court has the authority to order that one convicted of a felony or misdemeanor make restitution "to the victim" as part of his sentence, I.C. 35-50-5-3(a), or as a condition of probation, I.C. 35-38-2-2(a)(5). Appellant argues that only the deceased can be the victim of the crime of voluntary manslaughter and that therefore, because Lotamer's survivors were not "victims" of the crime, the trial court exceeded its authority in ordering that he make restitution to them.

This argument has never been squarely presented to this court. In **Whitehead v. State**

(1987), Ind., 511 N.E.2d 284, this Court vacated an order which called for the defendant to pay restitution to the family of the woman he murdered. The resolution of the issue, however, was based on the fact that the statute in force at the time of the crime did not authorize a judge to order restitution as part of a sentence, id. at 296-97, and the issue of whether such an order was properly made to "non-victims" was not addressed.

Decisions from the Court of Appeals which have addressed this issue indicate that one who suffers harm as a result of criminal wrongdoing, even if not the party directly against whom the crime was committed, may appropriately be considered a "victim" for the purposes of restitution. In **Kingston v. State (1985), Ind.App., 479 N.E.2d 1356,** the defendant was convicted of leaving the scene of an accident and was ordered to pay restitution to the Indiana State Highway Department and to owners of parked cars for property damage incurred by those parties.

The defendant argued that because the stoplight was damaged before the cars were damaged after he committed the crime of leaving the scene of the accident, these parties were not victims of the crime to whom restitution was properly payable. The Court of Appeals rejected this argument, stating:

> When the crime of leaving the scene of an accident, clearly one victim of that crime is the person who suffered personal injury or property damage as a result of the accident. It is equally apparent that any persons who sustained property damage as a result of the driver's flight are victims of his crime....

Id. at 1359 (citation omitted).

The Court of Appeals has twice considered the appropriateness of restitution orders imposed on defendants convicted of so-called "victimless crimes." In **McCloud v. State (1983), Ind.App., 452 N.E.2d 1053,** the defendant was ordered to make restitution

following a conviction for conspiracy to commit theft. He argued on appeal that because, unlike the crime of theft, "the crime of conspiracy has no 'victim,'" the trial court abused its discretion in ordering restitution. The Court of Appeals upheld the order stating:

> While in other circumstances we might agree restitution is an appropriate condition following a conspiracy conviction, in this case there was substantial evidence McCloud unlawfully removed Borden products from the plant in support of the conspiracy he had begun with [his co-conspirator]. In order to support its case, the State had to establish McCloud agreed to commit theft from Borden and did in fact take Borden's products as an overt act in furterance of the conspiracy.
>
> Therefore, under the facts of this

> case, we believe the trial court appropriately considered Borden a "victim of the crime"...and acted within its discretion in ordering McCloud to pay restitution....

Id. at 1056-57 (citation omitted).

The defendant in **Rumple v. State (1988), Ind.App., 529 N.E.2d 861,** was convicted of possession of marijuana and was ordered to make restitution. On appeal, Rumple argued that because his crime was "victimless," the restitution order was inappropriate. The Court cited McCloud and Kingston as examples from this state of instances where "the court could point to incidents of property damage as a result of the defendants' criminal acts, enabling those who suffered the damage to be considered 'victims.'" thereby justifying restitution orders. Id. at 864. The Court also cited a Colorado drug case which upheld a restitution order payable to the Drug Enforcement Agency, holding that a governmental agency could

appropriately be considered a victim and that the buy money expended by the agency was aloss for which restitution was a proper remedy. The Court of Appeals, however, set aside the lower court's restitution order because this particular set of facts showed a "lack of evidence...to support a finding that any party was a victim." Id. at 865. The Court stated that the order did not identify to whom restitution was to be made and that even if trial court considered the buy money expended here to be recompensable through its restitution order, "mere possession of marijuana per se causes no damage to anyone." Id. at 864-65.

It is clear from these cases that the word "victim" in the statutes authorizing restitution has not been construed so narrowly as to limit payment of restitution only to the person or entity actually subjected to the commission of a crime. Rather, restitution has properly been ordered payable to those shown to have suffered

injury, harm or loss as a direct and immediate result of the criminal acts of a defendant. The survivors of murder victims particularly their dependent children, could certainly come within this class. The trial court's restitution order here covered, among other things, the funeral and burial expenses incurred by Lothamer's family, as well as a figure designated as child support for the two minor children Lothamer left. These monetary losses borne by these parties were the result of appellant's criminal acts, and the trial court acted within its statutory authority when ordering restitution for their recompense.

3, Conditions of Probation

Appellant was sentenced to twenty years and fined $10,000 and court costs, and the trial court suspended seven years and half of the fine. Under the trial court's sentencing order, appellant has the period of his incarceration plus the period of probation plus thirty days following the

close of the probationary period (totalling eighteen years and thirty days) to make restitution and pay the fine and court costs or the sentence suspension will be revoked. The sentencing order also provided that if the appellant paid the restitution, court costs, and $1,000 of the fine within ninety days of the date of that order, an additional $4,000 of the fine would also be suspended. Appellant argues that having the amount of the fine ultimately payable and the continued suspension of the sentence condition on payment of restitution and partial satisfaction of the fine within a prescribed time frame was an abuse of discretion.

[15, 16] The power to fashion a sentence within statutorily prescribed parameters is a discretionary power vested in the trial court and a sentence will be set aside or modified on appeal only when it is manifestly unreasonable. **Scruggs v. State (1986), Ind., 489 N.E.2d 935.** A sentence is manifestly unreasonable if no reasonable person would find it appropriate given the

particular offense and offender. **Henley v. State (1988), Ind., 489 N.E.2d 376.** The sentencing power includes the statutory discretion to suspend and to order probation and set out its terms, and this Court will set aside a probation order only upon a showing that the trial court abused its discretion. **State ex rel. Abel v. Vigo Circuit Court (1984), Ind., 462 N.E.2d 61.**

[17] Although the sentencing and probation order here is admittedly unusual, none of its provisions can be described as unreasonable given the particular offense or offender. Nor is any provision in excess of the authority given to a sentencing court. The Court of Appeals has described the latitude accorded to trial courts in fashioning terms of probation as follows:

> The sentencing judge has a broad power to impose conditions designed to serve the accused and the community. The only limitation is

> that the conditions have a reasonable relationship to the treatment of the accused and the protection of the public. The object, of course, is to produce a law abiding citizen and at the same time to protect the public against continued criminal or antisocial behavior.

McCloud, 452 N.E.2d at 1056 (quoting Porth v. Templar, 453 F.2d 330, 333 (10th Cir.1971). The trial court's aim appears to have been to provide appellant with an incentive to make speedy restitution, which would also serve to vindicate the interests of the public. We cannot say that this was an abuse of discretion.

The conviction and sentence are affirmed. Appellant's petition for oral argument is denied.

SHEPARD, C.J., and GIVEN, PIVARNIK and DICKSON, JJ., concur.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

WILLIAM P. REINBOLD,)
PETITIONER)
)
V.)
)
PAUL KRANNING,)
Superintendent of)
Branchville Training)
Center.)
RESPONDENT)

JUDGMENT

This matter is before the Court on the Petition for Writ of Habeas Corpus for an individual in state custody pursuant to 28 U.S.C. § 2241 filed by the petitioner, William P. Reinbold, on August 16, 1991. Respondent filed its Response to Entry and Order to Show Cause and a Motion to Dismiss on November 8, 1991. Petitioner filed his Traverse to State's Return with supporting Affidavit on December 2, 1991. Petitioner also filed a Motion for Summary Judgment on September 16, 1991, and a Motion to Advance Cause for Hearing on February 24, 1992.

The Court, being duly advised, now

APPENDIX B

GRANTS the respondent's Motion to Dismiss and **DENIES** the petitioner's Motion for Summary Judgment. The Court finds that there is no need to conduct an evidentiary hearing in this matter. The instant Petition for Writ of Habeas Corpus is, therefore, **DISMISSED, with prejudice.**

IT IS SO ORDERED at Evansville, Indiana, this 24th day of April, 1992.

Gene E. Brooks, Chief
Judge United States
District Court Southern
District of Indiana

MEMORANDUM

This matter is before the Court pursuant to a Petition for Writ of Habeas Corpus filed August 16, 1991. The respondent has filed Proposed Findings of Fact, Conclusions of Law and a Proposed Order dismissing the action with prejudice. The Court, having reviewed the Petition for Writ

of Habeas Corpus, as well as petitioner's Motion for Summary Judgment and Travers with supporting Affidavit, concludes that there are no genuine issues of fact in dispute in this case. The Court **ADOPTS** as a part of this order the Proposed Findings of Fact and Conclusions of Law tendered by the respondent in this case.

The instant Petition essentially requests this Court to review whether the Indiana Trial Court committed "reversible error" in issuing certain instructions to the jury, in denying a motion for change of venue, and enhancing the petitioner's sentence pursuant to an Indiana Statute. However, it is clear that the interpretation of state laws and rules is a matter soley within the province of state courts so long as the construction and application of the state laws are not totally arbitrary or discriminatory. United States ex rel. Burnett v. Illinois, 619 F.2d 668 (7th Cir.1980), cert. denied, 449 U.S. 880 (1980). The Indiana Supreme Court

issued an opinion on June 8, 1990, addressing the same four issues. A review of that decision was not "totally arbitrary" or "discriminatory" by any standards applied. A federal court may not issue a Writ of Habeas Corpus based upon a perceived error of state law. Pulley v. Harris, 465 U.S. 37, 41 (1984).

The extent to which petitioner has attempted to raise federal claims in his Petition is probably best summarized by his own language found at page 7 of the Affidavit in support of the Petitioner's Traverse to State's Return. There he says, "[A]ny reasonable man would understand that a violation of a State Statute is a violation of the Indiana Constitution, as was cited in the Supreme Court's brief, and violating the Indiana Constitution, violates the Federal Constitution." This premise is not sufficient, in this Court's opinion, to adequately alert a state trial judge or even the Indiana Supreme Court to the presence

of federal claims during the petitioner's trial or appeal. In his Traverse, the petitioner has not filed with this Court any documents from his appeal or trial establishing that he did in fact raise federal in his state court proceedings. The petitioner has not suggested any reason why he could not present his federal claims to the state courts. Therefore, this Court concludes that Indiana state courts would find that petitioner waived his right to present his federal claims to Indiana courts.

Even if we could find federal claims to be among those listed in this Petition, relief is still not available to the Petitioner. Where the petitioner has failed to raise federal constitutional issues in the state court, and has either failed to exhaust his state court remedies or waived his right to pursue those remedies, the federal habeas petitioner must show cause for his procedural default and prejudice attributable thereto in order to obtain review of his defaulted

constitutional claims. Madyun v. Young, 852 f.2d 1029 (7th Cir. 1988). None of the materials in the petitioner's Traverse or supporting Affidavit suggest cause for procedural default. Indeed, the only conceivable source of cause referred to in the petitioner's materials is that of ineffective assistance of counsel. (As he states at page 5 of his Affidavit in support of the Traverse, "[w]hether [he] received ineffective assistance of counsel is not an issue here....") In the absence of any other suggestion of cause, plaintiff's procedural default cannot be excused.

In conclusion, this Court's review of the Petition finds that the only issues raised are matters of interpretation of state laws which cannot be subject for relief through habeas corpus. Even if it were possible to construe some of these claims as raising constitutional issues, there is no showing by the petitioner that he has ever attempted to raise those issues in the

state court below. Neither is there any showing by the petitioner of any cause for his default. Therefore, the Petition for Writ of Habeas Corpus must be **DENIED**, and this matter **DISMISSED, with prejudice.**

DATED: April 24, 1992.

Gene E. Brooks, Chief
Judge United States
District Court Southern
District of Indiana

APPENDIX B3

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Submitted June 25, 1992
Decided July 1, 1992

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge

WILLIAM P. REINBOLD	] Appeal from the United
PETITIONER-APPELLANT	] States District Court
	] for the Southern District
v.	] of Indiana, Evansville
	] Division.
PAUL KRANNING,	]
Superintendent of	] No. 91-C-121
Branchville Training	] Gene E. Brooks, Chief
Center.	] Judge.
RESPONDENT-APPELLEE	]

Petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court denied the petition and declined to issue a certificate of probable cause.

Petitioner has now filed an application for a certificate of probable cause. This court has carefully reviewed the final order of the district court and the record on appeal.

We find no substantial showing of the denial of a federal right; the petitioner

APPENDIX C

has failed to demonstrate the issues raised are debatable among jurists, a court could resolve the issues differently, or the questions deserve further proceedings. Barefoot v. Estelle, 463 U.S. 880,893 n.4 (1983).

Accordingly, the request for certificate of probable cause is **DENIED.**

IT IS FURTHER ORDERED that leave to proceed on appeal in forma pauperis is **DENIED** as moot.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

WILLIAM P. REINBOLD	)	
PETITIONER	)	
	)	
V.	)	**CAUSE NO. EV-91-121-C**
	)	
JACK DUCKWORTH,	)	
RESPONDENT [1]	)	

ENTRY DENYING PETITION FOR RENEWAL OF ISSUANCE OF CERTIFICATE OF PROBABLE CAUSE

This cause is before the Court on the petitioner's renewed petition for the issuance of a certificate of probable cause.

The Court, being duly duly advised, now **denies** the renewed petition for two reasons. First, the Court discerns no error in the reasoning or result of its initial denial of a certificate of probable cause on May 20, 1992. Second, the Court of Appeals has likewise denied the petitioner a certificate of probable cause in its order July 1, 1992.

ALL OF WHICH IS ORDERED this 27th day of August 1992

GENE E. BROOKS, Chief Judge
United States District Court

1. **Please take note that Duckworth has never been a Respondent in this cause.**

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

July 31, 1992

Before

Hon. WILLIAM J. BAUER, Chief Judge

Hon. HARLINGTON WOOD, Jr. Senior Circuit Judge

WILLIAM P. REINBOLD, Petitioner-Appellant	] Appeal from the United States District Court for the Southern District of Indiana, Evansville Division.
No. 92-2213 V.	]
PAUL KRANNING, Superintendent of Branchville Training Center, Respondent-Appellee	] No. 91 C 121] Gene E. Brooks, Chief Judge.

This matter comes before the court for its consideration of the "MEMORANDUM IN SUPPORT OF PETITION FOR RENEWAL FOR ISSUANCE OF PROBABLE CAUSE FROM DENIAL OD WRIT OF HABEAS CORPUS [F.R.C.P. 22(b)" filed herein on July 20, 1992, by the pro se appellant, which the court construes as a motion to reconsider the court's order of July 1, 1992 denying a certificate of probable cause.

On consideration thereof,

IT IS ORDERED that the motion is DENIED.

APPENDIX D

IN THE
SUPREME COURT OF THE UNITED STATES

No._____

WILLIAM P. REINBOLD
PETITIONER

V.

PAUL KRANNING, ET AL.
RESPONDENT(S)

PROOF OF SERVICE

I, William P.Reinbold, do swear and declare that on this date, pursuant to the Rules of the Supreme Court, I have served the attached Petition for an Extraordinary Writ of Habeas Corpus and Appendice attached thereto, on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing the same through the institution's mail and Certification through the Counselor at said institution, Branchville Training Center.

The names and addresses of those served are as follows:

Linley E. Pearson
Attorney General , Indiana
219 State House
200 W. Washington St.
Indianapolis, Indiana
46204
(Counsel for the Respondent(s)

United States Supreme Court
1 First Street, N.E.
Washington, D.C.
20543

William D Reinbold

SUBSCRIBED AND SWORN TO BEFORE ME

THIS 26th **DAY OF** January , **1993**

Ellen C Thompson

Notary Public in and for said County and State

Perry Co., Ind.
Expires 9/11/94

(affix seal here)